BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

BELLSOUTH TELECOMMUNICATIONS, INC.
D/B/A AT&T SOUTHEAST D/B/A AT&T SOUTH
CAROLINA

DOCKET NO. 2010-19-C

VS.

IMAGE ACCESS, INC. D/B/A NEWPHONE

SECOND AMENDED DEFENSES, ANSWER AND COUNTER-CLAIM
OF IMAGE ACCESS, INC. d/b/a NEWPHONE

Image Access, Inc. d/b/a NewPhone ("NewPhone"), hereby amends and supplements its Defenses, Answer and Counter-Claim filed on February 25, 2010 (as amended by the Amended Defenses, Answer and Counter-Claim filed on August 3, 2010), by amending, supplementing and restating its Defenses and Counter-Claim, as follows:

1. Paragraph 12 of the Defenses is amended and restated in its entirety to read as follows:

"12. AT&T's right to recover, if any, is offset and/or reduced in whole or in part by the doctrines of setoff and/or recoupment."

2. NewPhone otherwise reasserts and reiterates each and every statement and defense set forth in its original and amended Defenses and Answer as if copied herein in extenso.

3. NewPhone's Counter-Claim is hereby amended and restated in its entirety, to read as follows:

"**COUNTER-CLAIM**

And now, acting as Plaintiff in its Counter-Claim, NewPhone represents as follows:

1. Defendant is BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T").

2. NewPhone entered into a negotiated Interconnection Agreement with AT&T in 2002 (the "2002 Interconnection Agreement"), which set forth the terms and conditions of the resale of telecommunications services between the parties. Effective as of April 19, 2006, NewPhone and AT&T entered into a subsequent Interconnection Agreement, as amended and extended on March 31, 2009 (the "2006 Interconnection Agreement"), which supersedes the 2002 Interconnection Agreement. For purposes of this Counter-Claim, the 2002 Interconnection Agreement and 2006 Interconnection Agreement are referred to collectively as the "Interconnection Agreement." The Interconnection Agreement provides in relevant part, among other things, that:

> (a) The parties wish to interconnect pursuant to Sections 251 and 252 of the federal Telecommunications Act;[1]
>
> (b) When NewPhone purchases telecommunications services from AT&T for purposes of resale to end users, such services shall be equal in quality and subject to the same conditions that BellSouth provides to its end users;[2]
>
> (c) The Interconnection Agreement shall, where applicable, be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the Federal Communications Commission ("FCC") and appropriate State Commission;[3] and
>
> (d) Subject to effective and applicable FCC and State Commission rules and orders, AT&T shall make available to NewPhone for resale those telecommunications services AT&T makes available to customers who are not telecommunications carriers.[4]

3. The Telecommunications Act of 1996 (the "Act")[5] and regulations promulgated thereunder provide, among other things, that:

> (a) ILECs have "the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[6]
>
> (b) ILECs have "the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service…."[7]

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[1] Interconnection Agreement, General Terms and Conditions, Recitals ¶ 4.
[2] *Id*., General Terms and Conditions, Section 3.
[3] *Id*., General Terms and Conditions, Section 17.
[4] Interconnection Agreement, Attachment 1, Section 3.1.
[5] *See* 47 U.S.C. § 251 et seq.
[6] 47 U.S.C. § 251(c)(4)(A).
[7] 47 U.S.C. § 251(c)(4)(B).

(c) “The following types of restrictions on resale may be imposed: (2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if: (i) such promotions involve rates that will be in effect for no more than 90 days; and (ii) the incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.”[8]

(d) Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates.[9]

(e) “A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.”[10]

(f) “A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.”[11]

(g) “The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, less avoided retail costs….”[12]

(h) “Except as provided in 47 C.F.R. § 51.613, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.”[13]

(i) With respect to any restrictions on resale not permitted under 47 C.F.R. § 51.613(a), “an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and non-discriminatory.”[14]

4. The overarching purpose of the Act’s resale provisions is to permit competitive local exchange carriers (“CLECs”), such as NewPhone, to purchase for subsequent resale, services from the incumbent local exchange carrier

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[8] 47 C.F.R. § 51.613(a)(2).
[9] 47 U.S.C. § 251(c)(4)(A). *See also* FCC Order 96-325, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (rel. August 8, 1996).
[10] 47 C.F.R. § 51.603(a).
[11] 47 C.F.R. § 51.603(b).
[12] 47 C.F.R. § 51.607.
[13] 47 C.F.R. § 51.605(e).
[14] 47 C.F.R. § 51.613(b).

("ILEC"), such as AT&T, at a lower rate than the ILEC sells those services at retail. In short, the wholesale price should always be less than the retail price. AT&T has refused to abide by the Act and its purpose.

5. The disputes set forth in this Counter-Claim arise in connection with certain AT&T retail promotional or discounted offerings provided in conjunction with the sale of its retail telecommunications services to AT&T's end users. The retail promotional or discounted offerings at issue have lasted for more than 90 days and/or were offered by AT&T as a term and condition of service.

6. AT&T promotions and other discounted offerings provided in conjunction with the sale of its telecommunications services to retail customers take various forms, including without limitation, the promotions and offerings described in Paragraphs 7 through 16 below.

7. Cash Back Promotions. When a retail customer orders a qualifying telecommunications service, AT&T will provide the retail customer with a "cash back" offering in conjunction with ordering that service in the form of a check, gift card, bill credit, or other form to the retail customer. NewPhone is entitled to the full value of these promotions or offerings on the same terms and conditions and to the same extent as offered to AT&T's retail customers. AT&T has either failed to provide NewPhone any credit, or provided only a portion of the value of the cash back promotions.

8. For example, when AT&T offers retail telephone service in conjunction with a "$50 cash back" rebate to new customers, AT&T must make that offer available to resellers such as NewPhone "under the same conditions," that is, with a $50 cash rebate, and "at the rate for such telecommunications services less the avoided retail costs," that is, at the tariffed retail price less the wholesale discount. In this example, NewPhone would receive a $50 rebate for each new wholesale line but would still pay AT&T for the monthly use of the line at the tariffed retail rate less the wholesale discount. Here, the rebate offer does not change the competitive balance between the carriers. On the one hand, AT&T earns exactly the same margin – the tariffed retail rate less the wholesale discount – whether or not AT&T offers new customers a rebate. On the other hand, NewPhone receives exactly the same benefit that it normally receives from the avoided cost discount – the tariffed rate less the wholesale discount – and the same $50 rebate that AT&T offers new retail customers. Like AT&T, NewPhone is no better or worse off than NewPhone would be if AT&T was not offering the $50 rebate. Neither carrier gains a competitive advantage or a financial windfall as a result of the rebate program.

9. In Paragraph 12 of its Complaint, AT&T uses an example to explain its method for calculating the resale promotional credit due CLEC resellers of AT&T's cash back promotions. AT&T's method involves applying the Commission's wholesale discount of 14.8% to the face value of the promotion. The avoided cost discount represents the costs avoided when AT&T

provides the service on a wholesale rather than retail basis.[15] Therefore, the avoided cost discount should not be applied to *reduce* the amount of a promotion, such as a $50 cash back offer. As explained above in Paragraph 8, cash back promotions should be treated as a condition of service, which must be applied on a nondiscriminatory basis (i.e., if the retail customer qualifies for it, the reseller qualifies for it). If the avoided cost discount has any application to the cash back promotion, it should, based on the theory of costs avoided, be applied to reflect the costs AT&T avoids in providing the $50 cash back to the reseller rather than to AT&T's retail customer. The same costs (e.g., marketing, overhead, etc.) are avoided in this context. However, because the cash back promotion involves the payment of money by rather than to AT&T, the cost avoided discount should be applied in a manner that *raises* the amount of the promotion when provided to CLECs in the wholesale context. If applied in the manner AT&T suggests to the most common cash back promotions (i.e., promotions where the tariffed retail rate of the service *is less than* the amount of the associated cash back promotion), the effect of applying the avoided cost discount would be to increase AT&T's own revenues – and the costs to CLEC resellers – when a promotion is sold on a wholesale rather than retail basis. Clearly, this is not what was intended by the FCC's rules. This form of regulatory arbitrage is both anticompetitive and unlawfully discriminatory.

10. <u>Line Connection Charge Waiver Promotions</u>. When a retail customer orders a qualifying telecommunications service, AT&T will provide the retail customer with a one-time, up-front credit to the customer's bill which offsets the usual connection fee for such service. NewPhone is entitled to this promotion or offering on the same terms and conditions and to the same extent as offered to AT&T's retail customers. AT&T has either failed to provide NewPhone any credit, or provided only a portion of the value of the waiver of the connection fee despite NewPhone correctly applying and qualifying for the line connection charge waiver promotion pursuant to the parties' Interconnection Agreement.

11. <u>Secondary Service Charge Waiver Promotions</u>. When a current AT&T retail customer orders an additional, qualifying telecommunications service, AT&T will provide the retail customer with a one-time, up-front credit to the customer's bill which offsets the usual connection fee for such additional (or secondary) service. NewPhone is entitled to this promotion or offering on the same terms and conditions and to the same extent as offered to AT&T's retail customers. AT&T has either failed to provide NewPhone any credit, or provided only a portion of the value of the waiver of the connection fee despite NewPhone correctly applying and qualifying for the secondary service charge waiver promotion pursuant to the parties' Interconnection Agreement.

12. <u>Retention Credits</u>. When a current AT&T retail customer informs AT&T that the customer intends to discontinue service from AT&T, AT&T will

[15] 47 C.F.R. Section 51.607.

provide the retail customer, should the customer agree to remain with AT&T, a recurring monthly bill credit over a period of months as an inducement to the customer to continue to receive service from AT&T. NewPhone is entitled to this promotion or offering on the same terms and conditions and to the same extent as offered to AT&T's retail customers. However, AT&T has either failed to provide NewPhone any credit, or provided only a portion of the value of the retention credit despite NewPhone correctly applying and qualifying for the retention credits pursuant to the parties' Interconnection Agreement.

13. Mixed Bundled Service Offerings. AT&T offers certain telecommunications services to its retail customers in combination with other services in "mixed bundles." These mixed bundles may include both telecommunications services subject to resale under 47 U.S.C. § 251(c)(4) and other telecommunications services (e.g., long distance), as well as telecommunications and non-telecommunications services (e.g., information service). AT&T also offers certain promotions (e.g., cash back promotions) in combination with its mixed bundled service offerings. NewPhone has applied for and qualified for these mixed bundle promotions pursuant to the parties' Interconnection Agreement. If an AT&T retail customer can buy local telecommunications services as part of a mixed bundle, AT&T cannot shield such service from its resale obligations simply because it has chosen to offer the services as part of a mixed bundle. AT&T must make available for resale the telecommunications services contained within mixed bundle promotions by applying the wholesale avoided cost discount established by the Commission to the effective retail rate of the mixed bundle (i.e., the net price paid by the retail customer for the mixed bundle including credits, cash-back and/or other giveaways offered as part of the promotion). The wholesale discount must be applied to the effective retail rate in a manner that reduces the effective retail rate and price for resellers. For example, the effective retail rate of a $50 mixed bundle subject to a $100 cash back offering is negative -$50. Assuming a 20% avoided cost discount, the wholesale rate after application of the 20% discount is negative -$60. AT&T's refusal to make available for resale the telecommunications service included in a mixed bundle promotion at the effective retail rate reduced by the wholesale avoided cost discount constitutes an unreasonable and discriminatory restriction on resale.

14. Service Block Charges. AT&T retail customers can request certain "service blocks" from AT&T, whereby AT&T will block certain telecommunications services to the retail customer (*e.g.*, long distance toll service, three-way calling, directory assistance), in order to protect the customer from incurring additional charges for these blocked services. NewPhone is entitled to this promotion or offering on the same terms and conditions and to the same extent as offered to AT&T's retail customers. In the wholesale context, AT&T has charged NewPhone a fee for implementing certain service blocks in instances where AT&T's end users receive the same service blocks free of charge despite NewPhone correctly applying and qualifying for the service block pursuant to the parties' Interconnection Agreement.

15. Other Billing Errors. AT&T has over-billed and/or under-credited NewPhone for certain services or promotional offerings which appear to be errors in the billing process. For example, in some instances AT&T has incorrectly billed NewPhone for certain blocked services (presumably due to AT&T's failure to implement a service block) despite NewPhone correctly applying and qualifying for the service block pursuant to the parties' Interconnection Agreement. AT&T is not entitled to charges associated with and due to inaccurate and erroneous account administration and billing errors by AT&T, as reflected in and made the subject of disputes timely submitted by NewPhone to AT&T. All such charges should be credited to NewPhone's accounts.

16. Other Price Reduction Promotions and Offerings. In addition to the promotions and offerings described in Paragraphs 7 through 15 above, AT&T offers other promotions in conjunction with the sale of its telecommunications services to retail customers, which promotions have the effect of inducing the retail customer to receive or continue to receive service from AT&T. These promotions take various forms, and the foregoing descriptions do not limit this Counter-Claim with respect to any specific AT&T promotional or other service offering for which NewPhone qualified and applied pursuant to the parties' Interconnection Agreement.

17. Although NewPhone properly applied and qualified for each promotional offering, discount and credit under each category of promotions and offerings set forth in Paragraphs 7 through 16 above pursuant to the parties' Interconnection Agreement from as early as January 2003 to the present, AT&T has wrongfully failed to issue the credits due, or has credited only a fraction of the credit properly due NewPhone.

18. NewPhone timely submitted disputes to AT&T requesting appropriate credits and/or refunds with respect to each promotional offering, discount and credit under each category of promotions and offerings set forth in Paragraphs 7 through 16 above from as early as January 2003 to the present pursuant to the parties' Interconnection Agreement. However, AT&T neither provided the proper credit due NewPhone, nor provided any response as to why NewPhone should not receive the credits to which it is entitled.

19. AT&T has wrongfully denied and/or failed to respond to NewPhone's timely requests for the discounts, promotions and offerings and associated credits and/or refunds related to resold telecommunications services and promotions as set forth in Paragraphs 7 through 16 above.

20. Upon information and belief, AT&T is wrongfully discriminating against NewPhone by failing to provide NewPhone the same promotional credits, discounts and/or refunds as AT&T provides to other similarly situated CLECs in connection with its retail promotional offerings and discounts, including the cash back promotions. NewPhone disputes and disagrees with AT&T's calculation of

the proper amount of credit due CLECs under these promotional offerings, including the cash back promotions. However, to the extent that AT&T is crediting other similarly situated CLECs for any portion of the proper credit due resellers, NewPhone is entitled to at least the same amount of credit.

21. AT&T has violated various statutes and regulations, including but not limited to, 47 U.S.C. § 251(c)(4), 47 U.S.C. § 252(d)(3), 47 C.F.R. § 51.603, 47 C.F.R. § 51.605, 47 C.F.R. § 51.607 and 47 C.F.R. § 51.613 and breached the parties' Interconnection Agreement by: (i) failing to provide NewPhone with the appropriate resale discounts, credits and/or refunds to which NewPhone is entitled (both in the form of discounts, refunds and credits owed to NewPhone for amounts that NewPhone disputed but paid, and in the form of discounts and credits owed to NewPhone for amounts that NewPhone disputed and withheld) in connection with various AT&T retail promotional or discounted offerings, each reflected in and made the subject of disputes timely submitted by NewPhone to AT&T since January 2003, which include, but are not limited to, cash back, line connection charge waivers, secondary service charge waivers, retention credits, bundled services promotions, service block charges, other billing errors and other price reduction promotions and offerings; (ii) imposing unreasonable and discriminatory restrictions on resale; and (iii) failing to obtain necessary and prior approval from the Commission, pursuant to 47 C.F.R. § 51.613(b), prior to imposing restrictions on resale.

22. For the reasons stated above, since January 2003, AT&T has over-billed and/or wrongfully failed to credit or refund NewPhone's accounts, and owes NewPhone all amounts wrongfully withheld and/or not properly credited or refunded to NewPhone in an amount to be determined through discovery and hearing, which amount includes amounts which AT&T wrongfully billed NewPhone which were paid and disputed by NewPhone but which were not refunded or were under-refunded by AT&T. NewPhone is entitled to these amounts, including all late fees and interest on such amounts accrued pursuant to the parties' Interconnection Agreement.

23. WHEREFORE, for the reasons stated herein, NewPhone respectfully requests:

(a) That this Counter-Claim be deemed good and sufficient;

(b) That, after due proceedings are had, there be judgment in NewPhone's favor on its Counter-Claim, finding and declaring that AT&T has breached the parties' Interconnection Agreement by wrongfully overcharging NewPhone and wrongfully withholding credits due and payable to NewPhone, finding and declaring that NewPhone has been financially harmed as a result of AT&T's breach, finding and declaring that AT&T is liable to, and required to pay, refund and/or credit, NewPhone for all amounts wrongfully charged and withheld, under-credited or under-refunded by AT&T since January 2003, including late

(c) That the Commission grant such further relief to NewPhone as the Commission deems just and proper."

4. Other than the above amendment and restatement of Paragraph 12 of its Defenses, and the above amendment and restatement of its Counter-Claim, NewPhone reasserts and reiterates all of the paragraphs and provisions of its original and amended Defenses and Answer and Counter-Claim and prayers for relief, which paragraphs, provisions and prayers remain unchanged.

Respectfully submitted this 31st day of March, 2011.

s/ John J. Pringle, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has this date been served via U.S. Mail, postage prepaid, or electronic mail to all parties listed on the Official Service List.

This 31st day of March, 2011.

s/ John J. Pringle, Jr.